Devine v. Blue Star Enterprises, Inc., 2004-ERA-10 (ALJ May 21, 2004)

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 May 2004

CASE NO. 2004-ERA-00010

In the Matter of:

RICHARD O. DEVINE,
Complainant,

vs.

BLUE STAR ENTERPRISES, INC., and
FLUOR HANFORD, INC.
Respondents.

Appearances:

For the Complainant:
Richard O. DeVine, *pro se*

For the Respondents:
Charles K. MacLeod, Esq. *Chief Labor Counsel, Fluor Hanford, Inc., Richland, Washington*
Larry E. Halvorson, Esq. *Halvorson & Saunders, Seattle, Washington*
for Fluor Hanford, Inc.
Lucinda J. Luke, *Cowan Walker, P.S., Richland, Washington*
for Blue Star Enterprises

RECOMMENDED DECISION AND ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

Fluor Hanford Inc. (Fluor) moved for a summary decision dismissing the claims of Complainant, Richard O. DeVine, raised in his Complaint of Discrimination dated April 6, 2003. He alleged he was laid off from his job as a truck driver for Respondents, Fluor and Blue Star Enterprises (Blue Star) in retaliation for whistleblowing, and seeks relief

under the employment protection provisions of the Energy Reorganization Act, 42 U.S.C. § 5851, et *seq*. and implementing regulations the Secretary of Labor published at 29 C.F.R. Part 24. The Regional Administrator of the Occupational Safety and Health Administration dismissed his complaint on the ground that he failed to allege violations of nuclear laws or regulations that would bring his complaint under the protection of the Energy Reorganization Act. Complainant has responded to the motion for summary disposition.

Complainant had been dispatched to the job at Blue Star through the Teamsters union. After driving for about a month, he stopped work because he did not have the First Aid/CPR training Blue Star had included among the job qualifications it included in its dispatch request to the union. I find that the motion for summary disposition should be granted for three reasons. First, the complaint was untimely. Second, if the requirement that truck drivers have current First Aid/CPR certification is related directly to nuclear safety (which is doubtful), Complainant was not qualified for the job, and should have been removed. Third, if the training requirement is not directly related to nuclear safety (which is likely), the complaint does not fall within the protections of the Energy Reorganization Act, 42 U.S.C. § 5851.

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A. Complainant's contentions In his Complaint and his Opposition to Summary Judgment filed on March 24, 2004, Mr. DeVine alleges he was dispatched to the Hanford nuclear clean-up site by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local No. 690, to fill a position at Blue Star as a truck driver for a purge water truck. Blue Star is a subcontractor to Fluor, the U. S. Department of Energy's primary contractor for the clean-up of the Hanford nuclear site in southeast Washington. The Teamsters Union had dispatched Complainant to drive for several contractors at the Hanford site over 14 years.

Blue Star faxed a "dispatch slip" to the Teamsters' local on February 28, 2003 seeking a purge water truck driver to work one to two days, off and on, over the next week, beginning on March 3, 2003. Complainant's Opposition to Summary Judgment, Attachment N. Any Teamster the union dispatched to fill the job needed the qualifications given in the dispatch request: a current Class A commercial driver's license with a Tanker and Hazardous Materials endorsement, and training in several courses, including a 40 hour course in Hazardous Waste; a current 8 hour refresher course in Hazardous Waste; courses known as Radiation Worker II; H-GET; and First Aid/CPR. A final course, Hazardous Materials Employee Training, would be required, but would be provided at the job. *Id*. Complainant alleged he met all but one of the job requirements, because his First Aid/CPR certification had expired. Complaint, at ¶ 9; Opposition to Summary Judgment, Attachments G and M. He also alleged that Blue Star management was unconcerned when he told them his First Aid/CPR certification had lapsed when he reported to work on March 4, 2003. *Id*.

Complainant says union contract documents describe the duties of the job he began on March 4, 2003. Complaint, ¶ 1. He drove loads of hazardous material contained in drums and barrels, and a purge water truck that carried what Complainant characterizes as hazardous waste water. Complaint, at ¶¶ 1, 4, and 7. The water came from a well drilled in an area known as the 220 West area of Hanford, where underground tanks of high level radioactive toxins have leaked, contaminating soil and groundwater. *Id*. at ¶ 5.

A month later, on Friday, April 4, 2003, while dumping purge water at the Hanford Liquid Effluent Treatment Facility in the 220 East area of Hanford, Complainant says he read the procedures and training requirements for the Facility. *Id*. at ¶ 10. He does not say what prompted him to read them. He then contacted Fluor's training department, and was told that current First Aid/CPR training was required, as was another course, Introduction to Federal Motor Carrier Safety Regulations. *Id*. at ¶ 11. The information about the second course had not been given to the union as one of the job qualifications when it dispatched Complainant to Blue Star. *Id*. Complainant told Blue Star he was concerned it was not aware of Fluor's requirements for drivers on the Hanford site, and that Blue Star had failed to verify that its drivers met them. *Id*. at ¶ 12.

He also alleges in his Opposition to Summary Judgment that the purge water in the tanker truck he drove for Blue Star was a nuclear byproduct because: 1) it was dumped at an effluent treatment facility at Hanford designed to contain hazardous nuclear waste purged from the groundwater; 2) underground tanks on the Hanford site have contaminated an estimated 200 square miles of groundwater; 3) long term groundwater monitoring under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Resource Conservation Recovery Act, and the Atomic Energy Act of 1954 have proven that radioactive and other hazardous materials have entered the soil and groundwater at Hanford (although no basis for the assertion is identified); and 4) the Atomic Energy Act of 1954 requires safe handling, transportation and storage of radioactive and byproduct nuclear material wastes. Opposition to Summary Judgment at 4. He has offered no proof to counter the declaration filed by Fluor that the purge water he hauled did not meet the definition of nuclear waste byproducts. The portion of this order discussing Fluor's contentions deal with that declaration.

The next work day, Monday, April 7, 2003, he was assigned to drive the purge water truck, while he still did not meet the job's CPR/First Aid certification requirement. He used his "stop work" authority to interrupt the job until this situation was remedied, but managers of Blue Star and Fluor threatened to remove him from the job site and take away his badge to work on the site if he did not rescind his stop work order. He refused and the job was shut down. Blue Star sent Complainant to First Aid/CPR training that night. *Id*. at ¶¶ 13, 14. The next day, he was sent home because there was no work for him, and on Wednesday, April 9, 2003 he was told there was no work for him on April 9 or 10, 2004. On April 10, Blue Star told him he was being laid off because he lacked the required training to perform the job, and he needed to return his badge. *Id*. at ¶ 17. When

he raised the matter with Fluor, he was told he was being laid off because the job had ended. He says the rest of the crew continued to work, however. *Id*. at ¶ 18.

Later Fluor told Complainant he was laid off because his commercial driver's license was invalid, and he was not authorized to haul hazardous material. *Id*. at ¶ 19. Yet the State of Washington Department of Licensing maintains Complainant's license was fully valid and authorized him to haul hazardous material. *Id.* at ¶ 19; Complainant's Opposition to Summary Judgment, Attachments B and C.

B. Fluor's contentions Fluor contends that from the outset, the job for Blue Star driving the purge water truck was meant to be temporary, as the dispatch request faxed to the union states. Blue Star hired Complainant when the union dispatched him to the job as a Teamster who met the job's requirements. It claims the overall contract for which Complainant was hired was to end by April 28, 2003, but the purge water driving was done by April 8, 2003. Complainant drove the purge water truck until March 28, 2003, but not from March 31 to April 2, 2003, due to lack of work. Declaration of Robert Dobush in Support of Motion for Summary Judgment (Dobush declaration), Attachment A, at ¶ 2; Declaration of Darwin Tenny in Support of Motion for Summary Judgment (Tenny declaration), Attachment B at ¶ 3. Mr. Tenny told Complainant on Thursday, April 3rd, when he returned to pump the last hole, that the job would be completed on April 7th and that after demobilization on April 8, 2003 he would be laid off. Complainant immediately claimed that as a union member, he was entitled to continue to do any driving required on the job, not just purge water truck driving. Dobush declaration at ¶¶ 3, 6, and 8; Tenny declaration at ¶¶ 4 and 5. Driving the purge water truck was Teamster work under the labor agreement governing work at the Hanford site. Motion for Summary Judgment, Attachment G.

Fluor also submitted a declaration of an Environmental Compliance Officer of Duratek Federal Services Hanford, Inc., stating that the purge water Complainant hauled contained such low levels of radioactivity that it is not a nuclear waste byproduct, or subject to regulation under the Energy Reorganization Act or the Atomic Energy Act. Declaration of John A. Winterhalder in Support of Motion for Summary Judgment, Attachment C, at ¶ 2.

On the afternoon of Friday, April 4, 2003, Complainant "announced for the first time" that he had not been qualified for the job because his First Aid/CPR certification was out of date. Tenny declaration at ¶ 5.

The following Monday, April 7, Complainant used his "stop work" authority to close the job down, and refused an offer to have a person with current First Aid/CPR training ride with him in his truck. Dobush declaration, at ¶ 3. Blue Star arranged and paid for his First Aid/CPR re-certification training that evening. *Id*. When Complainant dropped his certificate of completion off at Blue Star's office that evening, he stated that he lacked

three other training courses, so he would not drive because he was untrained. Blue Star had believed he had all necessary qualifications when the union dispatched him to it, but made a search and found those three courses were not available for three weeks. It needed a purge water truck driver on its subcontract only for one more day. The union had no other qualified driver to dispatch to Blue Star, so Fluor deleted the position from Blue Star's subcontract for that day and provided a qualified Fluor employee to drive the purge water truck on the final day. Dobush declaration, at ¶ 4. A Fluor representative determined Complainant did not have required training and suggested Complainant be removed from the site. Tenny declaration at ¶ 7. It is unclear what training that Fluor employee thought Complainant lacked.

On April 10, 2003, Complainant was laid off as he had been told on April 4, 2003, because the purge water portion of the contract Blue Star hired him for was completed, and because Fluor had deleted the purge water truck driver from Blue Star's contract. No other purge water truck driver was needed for that contract or any other contract Blue Star had with Fluor. Dobush declaration at ¶ 5. Blue Star submitted its final invoice to Fluor for the project on which Complainant worked on April 15, 2003. Dobush declaration at ¶7.

C. Analysis

1. Standards for Summary Disposition This proceeding is governed by the regulations the Secretary of Labor published at 29 CFR Parts 18 and 24. An Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 CFR § 18.40(d). The party opposing the motion "may not rest upon the mere allegations or denials of such pleading….[but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). This rule is modeled on Rule 56 of the Federal Rules of Civil Procedure. Under it a judge "does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial" by viewing "all the evidence and factual inferences in the light most favorable to the non-moving party." Stauffer v. Wal-Mart Stores, Inc., ARB No. 99-107, ALJ No. 99-STA-21 at 6 (ARB Nov. 30, 1999), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985).

The party moving for a summary decision has the initial burden of showing that there is no genuine issue of material fact. This burden may be discharged by simply stating that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). There is no requirement that the moving party support its motion with declarations, affidavits or similar material negating the opponent's claim. *Celotex*, 477 U.S. at 324; Fed. R. Civ. P. 56(b). When a motion is properly supported, the nonmoving party must go beyond the pleadings to overcome the

motion. He may not merely rest upon allegations, but must set out specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 248. Fluor asserts that Complainant will be unable to make a prima facie case, on the grounds the complaint does not implicate nuclear safety, and submitted supporting declarations. It also contends the claim was untimely. Complainant must respond with evidence that would be sufficient to decide the claim in his favor. *Id*. at 249-250.

2. The complaint is untimely. Complaints under the Energy Reorganization Act must be made to the Secretary of Labor "within 180 days after such violation occurs," 42 U.S.C. § 5851(b)(1); *see also,* 29 C.F.R. § 24.3(b)(2). The time begins to run when the complainant is informed of the adverse employment action. *Jenkins v. U .S. Environmental Protection Agency*, ARB Case No. 98-146, ALJ Case No. 88-SWD-0002 (ARB Feb. 28, 2003) (applying statutes other than the ERA that have a 30 day period in which to present complaints to the Secretary of Labor). The Board followed the holdings of the U.S. Supreme Court that limitations periods in employment discrimination statutes often begin to run before an aggrieved employee is fired or laid off. It explained in *Jenkins*:

> The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *See generally Chardon v. Fernandez,* 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State Coll. v. Ricks,* 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated). *Jenkins,* slip op. at 12.

See also, *Fobbs v. Holy Cross Health Sys. Corp*., 29 F.3d 1439, 1444 (9th Cir. 1994).

Here the limitation period began to run when Mr. Tenny notified Complainant on Thursday, April 3, 2003 that he would be laid off on April 9, 2003. Tenny declaration, at ¶ 4. Complainant counters that it is not believable that Teamster positions were coming to an end on April 9, 2003, as work on the site continued. I regard it as significant, however, that Complainant acknowledged he was told on the morning of April 4, 2003 that he would be laid off for lack of work. Opposition to Summary Judgment at 3, Sec. III. The period to present a complaint to the Secretary of Labor would expire on Wednesday October 1, 2003 under the Tenny declaration or the next day under the Complainant's acknowledgment that he was informed of the layoff on April 4, 2003. As he did not make his complaint until October 6, 2003, it was barred by 42 U.S.C. § 5851(b)(1) and the implementing regulation at 29 C.F.R. § 24.3(b)(2).

3. No Protected Activity under the Energy Reorganization Act. When there is no direct evidence of discrimination, a complainant must raise the inference of discrimination by establishing a prima facie case. This requires the complainant to show that the respondent is subject to the Act; that the complainant engaged in protected activity; that he suffered an adverse employment action; and that a nexus exists between the protected activity and adverse action. The complainant also must show that the respondent had knowledge of the protected activity. 29 C.F.R. § 24.5(b)(2)(i)-(iv); s*ee also, Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100, 102, 103 & n. 6 (6th Cir. 1996); *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982). The burden then shifts to the respondent to produce evidence that it took the adverse employment action for a legitimate, nondiscriminatory reason. Under traditional Title VII analysis, the burden of persuasion always remains with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons for its action were not the true reasons, but pretexts for discrimination. *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981). In cases tried on the merits, the Board discourages this full *Burdine* analysis. *Kester v. Carolina Power & Light Co.*, ARB Case No. 02-007, ALJ Case No. 00-ERA-31 (ARB Sept. 30, 2003) slip op. at 5 & n. 12. On a motion for summary decision, however, the *Burdine* framework is a useful tool.

This claim falters on the second requirement, that there be protected activity. The complaint of October 6, 2003 identifies two acts of whistleblowing: the internal disclosure on April 3, 2003 that he did not have the First Aid/CPR training Blue Star had included as requirement number 7 for the job (see page 3 of its dispatch slip to the union), and the use of his stop work authority on Monday April 7, 2003. *See*, Complaint at ¶¶ 12-14; Opposition to Summary Judgment, Attachment N.

If current First Aid/CPR certification for truck drivers was required by some enforceable standard, and it related to nuclear or radiological safety, Complainant admits he was unqualified to drive. Laying him off as unqualified would have been appropriate. Complainant's view as expressed in his complaint is untenable, for it places the employer in a Catch-22 situation. The Employer could not go forward without some other qualified driver, but Complainant could not be laid off or terminated as unqualified, for doing so would be actionable retaliation for his whistleblowing.

This problem is not insoluble, however. There is no reason to treat the requirement Blue Star included in its driver dispatch slip for First Aid/CPR training as a requirement related to nuclear or radiological safety. No party has been specific about why truck drivers at Hanford needed that certification. Under the Hazardous Materials Transportation Uniform Safety Act of 1990, as amended, 49 U.S.C. § 5101 et *seq*., Pub. L. 101-615, 104 Stat. 3244, the Secretary of Transportation has authority to:

> prescribe by regulation requirements for training that a hazmat employer must give hazmat employees of the employer on the safe loading, unloading, handling, storing, and transporting of hazardous material and emergency preparedness for responding to an accident or incident

> involving the transportation of hazardous material. The regulations-- (1) shall establish the date, as provided by subsection (b) of this section, by which the training shall be completed; and (2) may provide for different training for different classes or categories of hazardous material and hazmat employees.
>
> 49 U.S.C. § 5107(a).

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The implementing regulations of the Secretary of Transportation are published at 49 C.F.R. § 172.704(a)(3). They state:

> (3) Safety training. Each hazmat employee shall receive safety training concerning-
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> (i) Emergency response information required by subpart G of part 172; (ii) Measures to protect the employee from the hazards associated with hazardous materials to which they may be exposed in the work place, including specific measures the hazmat employer has implemented to protect employees from exposure; and (iii) Methods and procedures for avoiding accidents, such as the proper procedures for handling packages containing hazardous materials.

The Hazardous Materials Transportation Uniform Safety Act and the regulation set out above may be broad enough to require general First Aid and CPR training for those transporting hazardous material, but no party has shown that the Secretary of Transportation has done so. No party has even shown that the purge water in issue has been designated as a hazardous material under the authority granted to the Secretary of Transportation in 49 U.S.C. § 5102(2). Congress has authorized the Secretary of Transportation to enforce any regulations implementing the Hazardous Materials Transportation Uniform Safety Act. 49 U.S.C. §§ 5122, 5123(b). It is not up to the Secretary of Labor to do so, unless whistleblower protection and nuclear safety are also involved.

Neither party has pointed to any language in the Energy Reorganization Act itself (42 U.S.C. § 5851 et *seq*.) that requires First Aid/CPR training of truck drivers. As Judge Jansen wrote in *Bauer v. United States Enrichment Corp*. 2001-ERA-9 (ALJ Apr. 23, 2001), approved in ARB No. 01-056 (ARB May 30, 2003):

> The ERA is a statute of circumscribed jurisdiction. Jurisdiction under the ERA may be established by some nexus between the activity for which protection is claimed and a goal, objective or purpose of the Atomic Energy Act or the chapter of which Section 5851 is a part. The Secretary [of Labor] has determined that the goals, objectives, and purposes of this

> statute relate to nuclear safety, therefore, there is no jurisdiction under this Act for sexual harassment, sex discrimination, or age discrimination.

The Administrative Review Board agreed that the Energy Reorganization Act could not be used as a means to adjudicate claims unrelated to nuclear safety, including claims for sex discrimination, sexual harassment, or age discrimination. Whether Complainant did or did not have current First Aid/CPR certification raises no issue of nuclear or radiological safety. Not every safety issue involves or implicates nuclear or radiological safety. Only those issues are germane in proceedings before the Secretary of Labor under 42 U.S.C. § 5851, as the Regional Administrator for OSHA pointed out when he dismissed this complaint in January 2004. This claim fails because it does not involve safety complaints pertaining to nuclear or radiological safety.

It is recommended that the Administrative Review Board enter a Decision and Order dismissing this complaint.

WILLIAM DORSEY
Administrative Law Judge